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In the Supreme Court of the United States

OCTOBER TERM, 1994

HON. EDWARD R. KORMAN, UNITED STATES DISTRICT JUDGE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY BRIEF FOR THE PETITIONER

ANDREW L. FREY
Counsel of Record
ROY T. ENGLERT, JR.
GARY A. WINTERS
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 778-0602

Counsel for the Petitioner

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The government's brief in opposition is most striking for what it does *not* say about the review of Title III wiretap applications by magistrate judges. Nowhere does the government argue or even suggest that the privacy interests with

which Congress was so concerned in Title III cannot be guarded adequately by magistrate judges, or that magistrate judges are less likely than appellate judges, district judges, and state court judges to concern themselves with the privacy interests inherent in electronic surveillance when ruling on wiretap applications. Indeed, because the government routinely supports the delegation of pretrial and trial-related tasks to magistrate judges, the absence of concern over the competence of magistrate judges to review wiretap applications is hardly surprising.

Because neither the government nor the court below has explained why magistrate judges should not be trusted to review wiretap applications, both have resorted to wordplay with the relevant (and some irrelevant) statutes. Moreover, the government engages in an unconvincing effort to minimize the significant burdens that review of Title III applications places on district judges. This Court should not sanction the government's unnecessary effort to curb experimentation with magistrate judges and should grant certiorari to review a decision that has significant consequences for the administration of justice in the federal courts.

1. The government's brief effort to minimize the first issue raised in the petition — the impact of the Second Circuit's decision on district judges' efforts to experiment with magistrate judges and thereby reduce their workloads — does not address the relevant issues. The government asserts that "[m]ost of the 1018 federal judges sitting in 1993 received few if any wiretap applications that year." Br. in Opp. 15. This figure, however, includes appellate judges, who virtually never review wiretap applications; the more relevant figure, cited in our petition (at 15), is the total number of authorized district court judgeships minus vacancies — currently, approximately 564.

Moreover, the government refers to the low number of "wiretap applications" that all judges and even judges in the

busiest districts must review. But the true extent of the burden of Title III review must take into account requests for extensions (which the government cites as 459 in 1993) and the periodic reports submitted by law enforcement officials (on which the government provides no figures). Extensions often are equally or more complex than the applications themselves because they include, in addition to whatever information is in the original application, information that has been accumulated since issuance of the order. Furthermore, the judge must review reports prepared by the U.S. Attorney every ten days that provide an update on the progress of the surveillance. The government's effort to minimize these burdens ignores the important fact that time spent reviewing Title III applications takes time away from a judge's core adjudicatory functions, and involves the judge in oversight of activities with which magistrate judges, due to their regular involvement in processing search warrants, are more familiar. And the government's own figures show that at least several hundred wiretap applications a year could be affected by the decision in this case; the government itself often petitions for certiorari in cases with far less widespread impact.

Judge Korman may indeed be the only federal judge so far to delegate Title III review to a magistrate judge, as the government asserts (Br. in Opp. 9), but this has no bearing on the importance of the issue presented. Every novel use of magistrate judges is a "first," but without further review by this Court the Second Circuit's decision is sure to deter judges in other districts from repeating Judge Korman's experiment.

2. The government, pointing to the fact that Title III authorizes judges of district courts and courts of appeals to approve wiretap applications, argues that Congress's enumeration of these judicial officers was a conscious limitation that reflects concern over "the degree of invasion of privacy involved in electronic eavesdropping." Br. in Opp. 10. That is no doubt true. Indeed, the history cited by petitioner

makes clear that the relatively untrained and unprofessional U.S. Commissioners were deemed unsuited to the task. Pet. App. 34a-35a. But there is no suggestion anywhere in the government's brief that the temperament, training, or experience of magistrate judges makes them less well suited than district or appellate judges to review Title III applications with sensitivity to the unique privacy concerns involved in eavesdropping.

Such a suggestion would, in any event, be misguided. As petitioner pointed out in his opinion, the determinations a magistrate judge must make before issuing a search warrant are similar in most respects to the determinations involved in issuing wiretap orders. Pet. App. 44a. Magistrate judges plainly are considered competent to protect the privacy interests associated with any conventional search, see Fed. R. Crim. P. 41(c), even though a search warrant may be so broad as to authorize extraordinary intrusions on personal privacy. And while the court of appeals and the government liken a wiretap to "a continuous film of events in your home, secretly recorded over a period of weeks or months" (Pet. App. 14a; Br. in Opp. 7), magistrate judges have been considered capable of authorizing the placement of hidden television surveillance cameras — an intrusion every bit as severe as electronic eavesdropping and one that demands the utmost in sensitivity to the privacy rights of persons under surveillance. *United States* v. *Biasucci*, 786 F.2d 504, 509 (2d Cir.), cert. denied, 479 U.S. 827 (1986). See also *United States* v. *Torres*, 751 F.2d 875, 885 (7th Cir. 1984) (television surveillance "is even more invasive of privacy" than interception of oral or wire communications), cert. denied, 470 U.S. 1087 (1985). There simply is nothing about the office of magistrate judge itself that disqualifies its members from performing the sensitive task of reviewing Title III wiretap applications. Accordingly, we turn to the government's statutory arguments, none of which withstands scrutiny.

3. The government makes a weak attempt to avoid the effect of the "notwithstanding" clause of the 1976 amendments to the Magistrates Act. In the government's view, this Court should discount both the plain meaning of the "notwithstanding" clause and its legislative history — which clearly indicates an intent to override previous statutory references to "the judge" or "the court" — because Title III contains the "distinctive" feature of empowering judges of the courts of appeals to review wiretap applications. Br. in Opp. 12.

In the first place, this argument ignores plain statutory language providing that district judges may delegate "*any* pretrial matter," and may do so "notwithstanding *any* provision of law to the contrary." 28 U.S.C. § 636(b)(1)(A) (emphasis added). That language encompasses all existing statutes vesting authority to rule on pretrial matters in a judge, regardless of the level that judge occupies in the federal judicial hierarchy.

Moreover, the delegation to judges of the courts of appeals has no special significance that would remove Title III from the class of statutes Congress intended to affect through the 1976 amendments. Congress has frequently included court of appeals judges among those empowered to perform a variety of judicial tasks that are normally performed by district court judges, such as granting a habeas corpus petition or a stay of state court proceedings in connection with a habeas petition (28 U.S.C. §§ 2241(a),(b); 2251), or releasing a defendant on bail pending sentence or appeal (18 U.S.C. § 3141(b)).

Furthermore, at the same time Congress enacted the supposedly "stringent" control of limiting review of wiretap applications to Article III judges (Br. in Opp. 9), it empowered any judge of a state court of general criminal jurisdiction to review applications, so long as the judge is authorized by a state statute to issue orders for the interception or wire, oral, or electronic communications. 18

U.S.C. § 2510(9)(b). The government finds it "anomalous" that Congress would sanction review of wiretap applications "down to the cadre of federal magistrates" when it empowered federal appellate judges to conduct review (Br. in Opp. 12), but it sees nothing unusual about the delegation of this authority to elected state judges, who often have less training and experience than the skilled professional magistrate judges. If anything, state judges in many jurisdictions are more likely than appointed magistrate judges to be subject to the types of pressures that could affect their concern with privacy interests. Congress's delegation of Title III authority to state judges demonstrates that neither the delegation to Article III judges in general, nor the delegation to judges of the federal courts of appeals, renders Title III impervious to the general mandate of the "notwithstanding" clause.

This Court's decision in *Giordano* v. *United States*, 416 U.S. 505 (1974), does not dictate otherwise. The government's discussion of *Giordano* dismisses the most critical feature of that case — namely, the fact that Title III's specification of the Justice Department officials who could authorize wiretap applications *postdated* the statute permitting the Attorney General to delegate his powers.* Thus, in *Giordano*, the Title III limitation reasonably could be construed as a rejection in the wiretap context of the earlier, broad delegation powers granted to the Attorney General.

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* The government acknowledges this distinguishing feature of *Giordano* in a footnote (Br. in Opp. 10-11 & n.4), but then dismisses it with the nonresponsive observation that *Giordano* "requires strict adherence to the statutory text." Here, of course, "strict adherence to the statutory text" favors petitioner, not the government: "[n]otwithstanding *any* provision of law to the contrary * * * a judge may designate a magistrate to hear and determine *any* pretrial matter" (28 U.S.C. § 636(b)(1)(A) (emphasis added)).

Here, however, no similar inference can be drawn from Congress's reference in Title III to judges of district and appellate courts. As petitioner pointed out in his opinion, the legislative history conclusively demonstrates that the 1968 Congress's purpose in empowering only judges to review wiretap applications stemmed from its concern that the then-existing U.S. Commissioners were not up to the task. Pet. App. 35a; see S. Rep. No. 1097, 90th Cong., 2d Sess. (1968), *reprinted in* 1968 U.S.S.C.A.N. 2112, 2179. When Congress abolished the office of U.S. Commissioner later in 1968 and created the office of magistrate, Congress's reason for placing review power over federal wiretap applications exclusively in the hands of Article III judges evaporated. And, when Congress in 1976 empowered magistrate judges to handle pretrial matters "notwithstanding any other law to the contrary," it made clear its intention to overcome prior references to "the judge" or "the court." H.R. Rep. No. 1609, 94th Cong., 2d Sess., *reprinted in* 1976 U.S.S.C.A.N. 6162. Thus, unlike the situation in *Giordano*, Congress broadened the delegation powers of federal judges in all circumstances in which a statutory reference to "judge" or "court" might otherwise appear to limit authority to an Article III judge, and it did so with full knowledge that many existing statutes contained such limitations.

Giordano also turned on the Court's concern over delegation from the Attorney General to his Executive Assistant. Congress had taken pains to circumscribe the authorizing power to politically responsible officials, and the Court was loath to disturb that allocation of power. *Giordano*, 416 U.S. at 516-523. A magistrate judge, by virtue of the requirement that he meet a host of statutorily prescribed qualifications, stands in a far different relationship to a district judge than the Attorney General's Executive Assistant stood in relation to the Attorney General.

The government also errs, as did the court of appeals, in relying on the Electronic Communications Privacy Act of

1986 to inform the scope of Article III judges' authority under Title III. Br. in Opp. 11. Had Congress simply referred to 18 U.S.C. § 2510(9) in order to empower magistrate judges to issue pen register orders, as the government suggests, the pen register statute would have been extremely confusing. It would have been quite unclear whether the reference back to Section 2510(9) was intended to incorporate the expansive affect of the 1976 Magistrates Act amendments. One would have to consider not only the reference back to Section 2510(9), but also the relevant portions of the Magistrates Act, to determine which judicial officers were authorized to issue pen register orders. The far simpler method was to make explicit in the new statute what Congress had already effectuated for Title III through the Magistrates Act; that action was not intended to alter the meaning of the 1976 amendments. See Pet. 19-22.

4. The government suggests that Congress's failure in the Magistrates Act to place wiretap authorizations within the class of pretrial matters subject to de novo district court review produces the "unlikely consequence," if Judge Korman prevails, that magistrate judges could issue wiretap orders subject to review only for clear error. Br. in Opp. 12. In finding fault with the lack of an opportunity for pretrial review of magistrate-issued wiretap orders, however, the government has merely described the lack of reviewability of *all* orders authorizing law enforcement officials to conduct a search, whether those searches are physical or through electronic eavesdropping and whether issued by a district judge or a magistrate judge. Thus, the government's argument does nothing to differentiate magistrate judges from other judges, and provides no reason for withholding this power from them.

Title III contains no procedure for review of *any* judge's issuance of a wiretap order, much less the de novo review the government implies should be required if magistrate judges were to issue wiretap orders under the authority of the

pretrial matters clause. As with the issuance of a search warrant, the propriety of an order authorizing a wiretap may be reviewed in an appeal by the defendant following the denial of a suppression motion and subsequent conviction, cf. *DiBello* v. *United States*, 369 U.S. 121 (1962), or in an appeal by the government following the grant of a suppression motion. 18 U.S.C. §§ 2518(10)(b), 3731.

While the government may take an appeal from the denial of an application for an order, 18 U.S.C. § 2518(10)(b), nothing in that section indicates that this right would be any different if the application were denied by a magistrate judge. Indeed, Section 2518(10)(b) provides a procedure for an appeal of a denial made by a "judge *or other official*" (emphasis added). In short, the government's reviewability argument is a pure straw man. Review of any decision by a magistrate judge on a wiretap order would proceed in precisely the same fashion as review of the identical decision by any other judicial officer empowered to review wiretap applications. Given this treatment of review of wiretap orders, Congress's concern about privacy in connection with wiretaps (see Br. in Opp. 12-13) adds nothing to the analysis of whether review of wiretap applications is properly considered a pretrial matter.

5. The government attempts to circumvent the Magistrates Act's "additional duties" clause by attaching special importance to the phrase "a judge of a United States district court or a United States court of appeals" in 18 U.S.C. § 2510(9). In the government's view, Congress's use of this language, rather than simply "the judge" or "the court," is dispositive. Br. in Opp. 13-14.

The language of Section 2510(9) simply cannot bear the weight the government's curious contention ascribes to it. First, as we showed above, the vesting of wiretap review power in appellate judges has no bearing on the scope of Article III judges' delegation powers. Second, the words "of

a United States district court" cannot possibly have been intended as a limitation on the power of district judges to delegate functions to magistrate judges. Rather, as the legislative history makes clear, the intent was to prevent *commissioners* from ruling on wiretap applications because of concerns over their professionalism. When the commissioner system was abolished and district judges were given broad power to delegate "such additional duties as are not inconsistent with the Constitution and laws of the United States," 28 U.S.C. § 636(b)(3), any rationale for the government's restrictive reading of Section 2510(9) disappeared.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ANDREW L. FREY
Counsel of Record
GARY A. WINTERS
ROY T. ENGLERT, JR.
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 778-0602

Counsel for the Petitioner

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